

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COSTCO WHOLESALE CORPORATION,

Plaintiff,

v.

AU OPTRONICS CORPORATION, et al.,

Defendants.

CASE NO. C13-1207RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on a motion for summary judgment from Defendants Au Optronics, Chi Mei, Hannstar, and LG Display.¹ Defendants requested oral argument, but the court finds oral argument unnecessary. For the reasons stated herein, the court DENIES the motion. Dkt. # 484.

II. BACKGROUND OF MULTIDISTRICT LITIGATION

Today the court considers for the first time the merits of the price-fixing claims that Costco will soon present to a jury. The motion this order resolves concerns what the court will call the “control exception” to the general rule of *Illinois Brick Co. v. Illinois*,

¹ With the exception of Hannstar, each of the remaining Defendants is a group of at least two entities. The parties know who belongs to each group of Defendants, and the court simplifies its discussion by referring to each group of Defendants as a single Defendant and not reciting most parties’ full corporate names.

On August 28, after briefing on this motion was complete, the court received a letter from counsel for Hannstar announcing a settlement of Costco’s claims against Hannstar. No one has formally confirmed that settlement, and the court will treat Hannstar as a Defendant until the parties file a confirmation of that settlement.

1 431 U.S. 720 (1977), that only direct purchasers of price-fixed goods or services have
2 standing to sue for federal antitrust damages. Before considering the control exception,
3 however, the court remarks on its role in this case.

4 This case is one of dozens that the Judicial Panel on Multidistrict Litigation
5 assigned to the Honorable Susan Illston in the United States District Court for the
6 Northern District of California (the “MDL court”) for coordinated pretrial proceedings.
7 All of the MDL cases arise from a conspiracy allegedly spanning nearly a decade to fix
8 the prices for thin-film transistor liquid crystal display panels (“TFT-LCD panels” or
9 “panels”). There are allegedly many conspirators, and the conspirators themselves
10 allegedly relied on a complicated web of corporate parents, subsidiaries, joint ventures,
11 and other related entities to effectuate the conspiracies. The preceding sentences do not
12 begin to describe the MDL court’s gargantuan task. There are more than 9,000 entries on
13 the MDL court’s docket, more than 8,000 of which came before the MDL court
14 suggested that the JPMDL transfer Costco’s case back to this court for trial. The MDL
15 court itself has presided over civil and criminal trials, and prepared others for trial in the
16 courts in which they originated.

17 This case is among those that the MDL court prepared for trial. Costco, which
18 opted out of participation of a class of direct purchaser plaintiffs that first sued in late
19 2006 and that the MDL court certified in March 2010, sued more than a dozen groups of
20 Defendants, contending that as a result of their conspiracy, it paid too much for finished
21 products incorporating the price-fixed TFT-LCD panels.

22 Defendants resisted Costco’s claims vigorously in the MDL court. Defendants
23 filed dozens of dispositive motions on a schedule that the MDL court set. In rulings on
24 those motions, the MDL court pared Costco’s claims, but did not completely resolve
25 them. In July 2013, the JPMDL returned Costco’s suit here, to the district in which it
26 originated, for trial.

1 The parties initially agreed that their claims were ready for trial. After the court
2 set a trial schedule, adopting the parties' suggestions as to deadlines for pretrial filings,
3 Defendants changed their mind about the case's readiness for trial. They requested leave
4 to file two summary judgment motions. Accepting as at least colorable Defendants'
5 representations that these motions were necessary despite the MDL proceedings, the
6 court permitted the motions.

7 After reviewing those motions, it seems that Defendants view this court as part
8 trial court sequel, part court of appeals. They ask the court both to revisit the MDL
9 court's rulings and to permit them to request summary judgment on issues that they
10 neglected to present in dispositive motions before the MDL court. This court, however,
11 is not the court of second chances that Defendants seem to envision. This court is
12 continuing the MDL court's pretrial work into trial, and it will rule accordingly.

13 **III. ANALYSIS OF CONTROL EXCEPTION MOTION**

14 **A. *Illinois Brick* and the Control Exception**

15 *Illinois Brick* generally confers statutory standing to recover for antitrust injuries
16 only on plaintiffs who purchase products directly from a defendant who violates the
17 antitrust laws. Customers who buy lemonade from a neighborhood stand cannot sue
18 farmers who conspire to fix the prices of lemons, even if they paid more for lemonade.
19 *Illinois Brick* dictates that if anyone is to privately enforce the antitrust laws, it must be
20 the direct purchasers of the price-fixed lemons – in this example the operators of the
21 lemonade stand.

22 As a general rule, general rules have exceptions, and the *Illinois Brick* rule is no
23 different. Among those exceptions is the control exception, which in its simplest form
24 confers standing on an indirect purchaser who purchases goods from a direct purchaser
25 under the control of a price fixer. If Lemons, Inc. conspires with other growers to fix
26 lemon prices, and sells lemons to its wholly-owned subsidiary, Lemonade, Inc.,
27 customers of Lemonade can sue Lemons to recover the overcharge they paid for

1 lemonade. Indeed, even if Lemonade buys its lemons solely from one of Lemons's
2 conspirators (an entity with no control over Lemonade), Lemonade's customers may sue
3 the conspirator directly because it conspired with Lemonade's corporate parent to fix
4 lemon prices. Courts, particularly the Supreme Court, have been reluctant to carve out
5 exceptions to the *Illinois Brick* rule, but one is necessary in instances like these, because
6 there is no realistic possibility that Lemons would permit its subsidiary Lemonade to sue
7 it or one of its conspirators. Without an exception, there would be no realistic possibility
8 of private antitrust enforcement. And, without an exception, price fixers and other
9 anticompetitive entities could evade liability simply by incorporating subsidiaries to
10 purchase and distribute their goods to the consuming public.

11 **B. Defendants Waived Summary Judgment as to the Timing of the Control**
12 **Exception By Failing To File a Timely Motion.**

13 Defendants and Costco hashed out their version of the lemon conspiracy in the
14 MDL court. Costco did not purchase products containing price-fixed TFT-LCD panels
15 directly from any Defendant. About 8% of the sales for which it claims damages came
16 from Samsung Electronics America, Inc., which is a wholly-owned subsidiary of
17 Samsung Electronics Corporation, Inc., which was admittedly a participant in the price
18 fixing conspiracy at issue. The other 92% of sales for which Costco seeks damages came
19 from vendors for whom demonstrating control by a conspirator (or control of a
20 conspirator)² is substantially more complicated than the hypothetical lemon market the
21 court has discussed. Those vendors are Philips Electronics North America, Sharp
22 Electronics Corporation, JVC Americas Corporation, Panasonic Corporation of America,
23 and two United States subsidiaries of Toshiba Corporation. Considering whether any of
24 these vendors was under control of a conspirator (or, alternatively, whether any of these
25 vendors controlled a conspirator) requires consideration of a host of joint venture

26 ² Among the MDL court's rulings was that the control exception applies not only when a
27 conspirator controls the entity from which a plaintiff purchased price-fixed goods, but also when
28 that entity controls a conspirator. Nov. 19, 2012 MDL ord. (Dkt. # 297) at 5. Defendants
believe the MDL's ruling was error, but they do not challenge it in this motion.

1 agreements, sales and purchases of stock, and other evidence of corporate control that
2 fluctuated over the course of a conspiracy that Costco claims extended from 1998 until
3 federal law enforcement exposed the conspiracy at the end of 2006. Control continued to
4 fluctuate after the exposure of the conspiracy.

5 Defendants invite the court to trace the web of control for each of Costco's
6 vendors to arrive at the conclusion that, as a matter of law, Costco cannot establish the
7 control exception for all or a significant portion of its purchases from those vendors. But
8 Defendants already extended a version of that invitation to the MDL court, which that
9 court declined. The MDL court found genuine issues of material fact as to the
10 application of the control exception to Costco's purchases from Panasonic and JVC.
11 Dec. 26, 2012 MDL ord. (Dkt. # 299). The MDL court did, however, grant summary
12 judgment that Costco could not establish the control exception as to purchases from at
13 least seven other vendors. *Id.*

14 Defendants insist that the court can grant summary judgment where the MDL
15 court did not because they have a new argument: that the control exception depends not
16 only on a conspirator's control over the entity from whom the plaintiff purchased the
17 product, but also on showing that a conspirator had control on the day the plaintiff sued.
18 As an example, Defendants contend that Philips owned half of LG Display until late
19 2004, then owned a successively decreasing minority interest until March 2009, and
20 thereafter owned no portion of LG Display. Regardless of when Costco purchased
21 products containing TFT-LCD panels, Costco did not sue over those purchases until the
22 last day of November 2010. In Defendants' view, because Philips did not control LG
23 Display on that day, Costco cannot establish the control exception as a matter of law.
24 Defendants advocate a simple rule: a plaintiff seeking to recover for indirect purchases
25 must establish that the entity from which it purchased price-fixed goods was within the
26 scope of the control exception on the day the plaintiff sues. Control at any other time is,

1 in Defendants' view, insufficient as a matter of law. The court will refer to Defendants'
2 proposal as the date-of-suit rule.

3 Putting aside the merits of the date-of-suit rule, Defendants have no adequate
4 justification for waiting to announce it until after the MDL court completed summary
5 judgment rulings. The justification they offer is that they did not realize that they should
6 advocate that rule until they considered Costco's responses to their summary judgment
7 motions. That is almost certainly inaccurate. Costco points out that Defendants first
8 raised issues relating to the timing of control in their reply brief on a summary judgment
9 before the MDL court, and Defendants again raised the issue at oral argument before the
10 MDL court. Defendants do not contest as much, but they contend that they never
11 expressly proposed the date-of-suit rule, although they do not explain why. Even
12 accepting Defendants' assertions at face value, courts typically do not permit new
13 dispositive motions because a party realizes, after a first (or umpteenth) round of
14 dispositive motions, that it could have made other arguments. Pretrial schedules exist in
15 part to announce to parties that they must put their dispositive arguments on the table in a
16 timely fashion, or forego the benefits of a dispositive motion. That, by itself, is a
17 sufficient reason to deny Defendants' motion for summary judgment. The motion is
18 untimely; Defendants should have brought it during the time the MDL court allocated for
19 dispositive motions. If Defendants now wish to prevail by avoiding the control
20 exception, they must do so at trial.

21 **C. The Court Will Not Adopt Defendants' Date-of-Suit Rule.**

22 Defendants' motion requests two forms of relief. One, which the court has already
23 denied, is for an application of the date-of-suit rule to the evidence regarding Defendants'
24 control between Defendants and the vendors from whom Costco made its purchases. The
25 other form of relief that Defendants request is a declaration that the date-of-suit rule is an
26 accurate statement of the law to be incorporated into a jury instruction. Although
27 Defendants' failure to timely move for summary judgment means that they have waived

1 their right to have the court determine if the application of that rule to the evidence
2 demands partial judgment as a matter of law, they have not waived their right to request
3 jury instructions. Why Defendants believed it was necessary or appropriate to submit a
4 summary judgment motion in addition to the several hundred pages of argument the
5 parties submitted with respect to their jury instruction disputes, the court can only guess.³

6 In considering the validity of the date-of-suit rule, the court looks to the MDL
7 court's rulings. That is, in the court's view, a necessary result of the MDL process. The
8 MDL court stood in this court's place for pretrial proceedings. When this court makes
9 pretrial rulings on issues of law, it does not change those rulings on the eve of trial absent
10 a demonstration of manifest error or an intervening change in controlling law. The court
11 will take the same approach to the MDL court's rulings. Any other approach would be
12 antithetical to the MDL process, which is designed to reduce the burden of sprawling
13 multidistrict litigation on the courts and the parties. The transfer of a case from an MDL
14 court to a trial court is for purposes of applying the MDL court's rulings at trial. It is not
15 an opportunity for the parties to relitigate factual or legal issues, or to litigate in the first
16 instance issues that they should have raised before the MDL court.

17 With those comments in mind, the court rejects the date-of-suit rule because it is
18 convinced that the MDL court would have rejected it. The MDL court considered the
19 control exception both generally and in the context of this price-fixing conspiracy.
20 Absent manifest error or a change in controlling law, the MDL court's understanding of
21 the control exception is the one that will govern in this litigation. For example, the court
22 largely omitted legal citations in its discussion in Part III.A of the *Illinois Brick* rule and
23 the control exception. That is because the MDL court already provided citation when it

24 ³ Neither Defendants' request for a jury instruction nor Costco's response to Defendants' motion
25 addresses a more fundamental issue: the Ninth Circuit has held that "[b]ecause the court (and not
26 a jury) decides standing, the district court must decide issues of fact necessary to make the
27 standing determination." *Martinez v. Concord EFS, Inc. (In re ATM Fee Antitrust Litig.)*, 686
28 F.3d 741, 747 (9th Cir. 2012). It is not clear to the court why the jury should be instructed as to
the control exception or any other aspect of the *Illinois Brick* inquiry into a plaintiff's standing to
invoke the antitrust laws.

1 considered the same issues. This court will not reinvent the wheel. Although the MDL
2 court did not specifically address the timing of the control exception, its rulings convince
3 the court that it would have rejected Defendants' date-of-suit rule.

4 First, the court observes that the MDL court was aware of Defendants' evidence
5 and arguments regarding the timing of control. The MDL court nonetheless denied
6 Defendants' motion for summary judgment as to purchases from Panasonic and JVC.
7 The MDL court did not expressly address the timing of the control relationships between
8 Defendants and those two vendors, but it was aware of evidence on that issue. It is not
9 plausible that the MDL court would have accepted the date-of-suit rule.

10 Second, the MDL court based its rulings on the control exception on a line of
11 Ninth Circuit authority that does not support the date-of-suit rule. That line of authority
12 began a few years after *Illinois Brick* with *Royal Printing Co. v. Kimberly-Clark Corp.*,
13 621 F.2d 323 (9th Cir. 1980) and ended with *Brennan v. Concord EFS, Inc. (In re: ATM*
14 *Fee Antitrust Litig.)*, 686 F.3d 741 (9th Cir. 2012).

15 The *Royal Printing* court first announced the control exception in this circuit,
16 holding that *Illinois Brick* "does not bar an indirect purchaser's suit where the direct
17 purchaser is a division or subsidiary of a co-conspirator." *Royal Printing*, 621 F.2d at
18 326. Driving the court's decision was its recognition that it was unlikely that the direct
19 purchaser would sue, because its "co-conspirator parent w[ould] forbid its subsidiary or
20 division to bring a lawsuit that would only reveal the parent's own participation in the
21 conspiracy." *Id.* Although the court recognized a "small risk of multiple recovery"
22 stemming from the small chance that a controlled subsidiary might sue, it accepted that
23 risk where its "only alternative [was] to effectively immunize the transactions [before it]
24 from private antitrust liability" *Id.*

25 In *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145-46 (9th Cir.
26 2003), the court offered what was arguably an expansion of the control exception – that
27 "indirect purchasers can sue for damages if there is no realistic possibility that the direct

1 purchaser will sue its supplier over the antitrust violation.” In *Freeman*, the court
2 considered a regional multiple listing service (“MLS”) that purchased subscriber support
3 services from local associations of real estate agents. Those local associations owned the
4 MLS and appointed its board of directors. *Id.* at 1141. The associations fixed the support
5 fee they charged the MLS, and the MLS charged individual subscribers a fee. *Id.* The
6 court held that the subscribers could sue the associations, even though the subscribers did
7 not directly pay the fixed support fee. When the court concluded that there was “no
8 realistic possibility” that the MLS would sue the associations, it noted that the
9 associations owned the MLS and appointed its board of directors, and that there was thus
10 “no realistic possibility [the MLS] will sue them.” *Id.* at 1146.

11 In *ATM Fee*, the court concluded that the no-realistic-possibility-of-suit rule from
12 *Freeman* was merely a different way to express the control exception. In that case, the
13 court considered an ATM network that was at one point owned by its members, which
14 included banks that issued ATM cards. *ATM Fee*, 686 F.3d at 745. After the network
15 became a standalone corporation, the card-issuing banks had influence on the network’s
16 decisions, but no formal vote or veto power. *Id.* at 745-46. ATM cardholders sued,
17 contending that the banks and the network had conspired to fix the interchange fees that
18 banks paid the network for foreign ATM transactions (*i.e.*, transactions in which a
19 cardholder uses an ATM owned by someone other than his or her issuing bank). *Id.* at
20 746. The cardholder plaintiffs did not directly pay the interchange fee, but they alleged
21 that the purpose of fixing that fee was to raise the foreign ATM fee that cardholders paid
22 in those transactions. *Id.* at 745 (describing interchange fee and foreign ATM fee), at 753
23 (“Plaintiffs argue that . . . Defendants conspired to fix interchange fees for the purpose
24 and effect of fixing foreign ATM fees.”). The court concluded that Plaintiffs could not
25 take advantage of any exception to *Illinois Brick*, including the control exception. The
26 court observed that once the network became a standalone corporation, card-issuing
27 banks owned only 10% of its stock, and that ownership of the remainder was widely

1 distributed. *Id.* at 757. There was no evidence that the banks dominated the network’s
2 board of directors. *Id.* The agreement between the network and its members (including
3 the card-issuing banks) gave the members influence over pricing decisions, but left the
4 network with the “ultimate power to change interchange fees based on market
5 conditions.” *Id.* The network agreed to take input from an advisory board comprised of
6 card-issuing banks, but that board could not control the network’s decisions. *Id.* at 758.

7 The *ATM Fee* court mentioned the possibility that *Freeman* had created a new
8 exception to *Illinois Brick* for situations in which there was “no realistic possibility of
9 suit” by the direct purchaser against the price fixer. *ATM Fee*, 686 F.3d at 749. The
10 court rejected that possibility, concluding that “*Freeman* did not create a new variation of
11 the [control] exception, because *Freeman* relied on ownership and control to find
12 standing.” *Id.* at 756. The court interpreted *Freeman* to stand for the rule that “whether a
13 realistic possibility of suit exists . . . depends on the existence of ownership or control
14 between the direct purchaser and the seller.” *Id.*

15 The MDL court provided essentially the same summary of *ATM Fee* and its
16 predecessors. Absent from the MDL court’s orders as well as from Ninth Circuit
17 authority is any mention of a timing rule akin to the date-of-suit rule. As the court has
18 already noted, Defendants presented timing arguments to the MDL court. The MDL
19 court acknowledged at least some of those arguments in denying summary judgment as to
20 Panasonic, but espoused no one-size-fits-all timing rule. The court does not know what
21 arguments the *ATM Fee* defendants presented, but the Ninth Circuit did not announce a
22 timing rule despite incentive to do so. Members, including the card-issuing bank
23 defendants, controlled the ATM network in *ATM Fee* until February 2001. *Id.* at 745.
24 Plaintiffs sought damages dating back to July 2000, but did not sue until July 2004. *Id.* at
25 746. By Defendants’ date-of-suit rule, there was no need for the *ATM Fee* court to
26 discuss the banks’ former control of the ATM network. Because the banks did not
27 control the network on the day the cardholder plaintiffs sued, their control was irrelevant

1 (at least according to Defendants' date-of-suit rule). But instead of making that simple
2 pronouncement, the *ATM Fee* court focused on plaintiffs' allegations, concluding that
3 there were no allegations of conspiracy among the bank defendants during the time that
4 they controlled the ATM network. *Id.* at 757 n.10.

5 The court cannot fully divine the views of the MDL court or the Ninth Circuit on
6 the date-of-suit rule merely because those courts have not mentioned that rule (or another
7 timing rule). The timing of control is surely relevant in some cases, as the MDL court
8 recognized with respect to Panasonic. Returning to the court's hypothetical lemon-
9 product market, lemonade purchasers cannot sue Lemons, Inc. over their purchases from
10 Lemonade, Inc. based purely on evidence that Lemons owned Lemonade years before
11 Lemons's price-fixing conspiracy. But because no court has elevated the timing of
12 control to the make-or-break factor that Defendants advocate, this court will not do so
13 either.

14 The question that determines the applicability of the control exception, as both the
15 MDL court and *ATM Fee* court articulated it, is whether, *because of control* between a
16 direct purchaser and a price fixer, there is no realistic possibility that the direct purchaser
17 will sue the price fixer. *ATM Fee*, 686 F.3d at 756 (“*Freeman* outlines that . . . whether a
18 realistic possibility of suit exists . . . depends on the existence of ownership or control
19 between the direct purchaser and the seller.”) (quoted by MDL court in Nov. 19, 2012
20 ord. at 5). The timing of control is perhaps relevant to that question, but not always
21 dispositive.

22 Imagine, for example, that Lemonade, Inc. is the wholly-owned subsidiary of
23 Lemons, Inc. throughout Lemons's participation in a lemon-price-fixing conspiracy.
24 When the conspiracy ends, Lemons spins Lemonade off as an independent corporation.
25 Whether there is a realistic possibility of suit *because of control* in that situation is an
26 open question. Is it realistic that a former subsidiary would sue its former parent for
27 wrongs that occurred while the subsidiary was under its parent's control? Perhaps in

1 some cases, perhaps not in others. Defendants' date-of-suit rule ignores any nuance. By
2 Defendants' rule, even if Lemonade had agreed as a condition of the spinoff that it would
3 not sue Lemons for past wrongs, lemonade purchasers could not sue. By Defendants'
4 rule, even if Lemonade had knowingly acquiesced to paying the fixed price while under
5 Lemons's control, lemonade purchasers could not sue. By Defendants' rule, even if
6 Lemonade had conspired to fix the price that Lemons charged it while under Lemons's
7 control, lemonade purchasers would have no remedy.

8 This final hypothetical example is particularly troubling, because it provides a
9 blueprint for price fixers: conspire with your parent company to fix prices, but also
10 conspire with your parent company to be spun off once the conspiracy is exposed.
11 Although Ninth Circuit authority is silent as to a catchall rule for the timing of control, it
12 is explicit that no price fixer should be allowed to evade civil liability by manipulating its
13 corporate umbrella. *E.g.*, *Freeman*, 322 F.3d at 1146 ("Were we to grant immunity . . .
14 merely because defendants nominally sell services through another entity rather than to
15 consumers directly, we would risk opening a major loophole for resale price maintenance
16 and retailer collusion."); *Royal Printing*, 621 F.3d at 327 (noting that it would be
17 "intolerable" to "close off every avenue for private enforcement of the antitrust laws" by
18 prohibiting indirect purchasers from suing price fixers who sell goods to their
19 conspirators' subsidiaries).

20 Before concluding, the court observes that the parties do not agree about the date
21 on which Costco sued. They agree that Costco filed the complaint in this case in
22 November 2010. Costco, however, argues that it is entitled, as former member of the
23 class of direct purchasers who first sued Defendants in late 2006, to claim that date as the
24 date on which it sued. The court's disposition today makes it unnecessary to resolve this
25 dispute. It notes, however, that one of pitfalls of Defendants' date-of-suit rule is that it
26 would encourage defendants in a far-reaching conspiracy like this one to race to
27 manipulate their corporate web to their advantage while the victims of the conspiracy plot

1 their lawsuits.⁴ The court doubts that any principled application of the law would deny
2 Costco some portion of its damages merely because it did not sooner depart from the
3 direct purchaser class.

4 IV. CONCLUSION

5 For the reasons previously stated, the court DENIES Defendants' summary
6 judgment motion. Dkt. # 484.

7 DATED this 11th day of September, 2014.

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10 The Honorable Richard A. Jones
11 United States District Court Judge
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24 ⁴ Defendants' date-of-suit rule is perhaps commendable in its simplicity, but that simplicity
25 disguises more pitfalls than the ones the court has identified so far. If all that matters is the
26 possibility of suit by an uncontrolled (or uncontrolling) direct purchaser, the date of suit is no
27 more relevant than any other day on which a direct purchaser could sue. The logic underlying
28 Defendants' date-of-suit rule dictates that whether control changes before a plaintiff sues or after,
a price-fixer can avoid liability to indirect purchasers so long as there is *any* period of time where
a direct purchaser could have sued. The date of suit is no more significant than any other day.